THE

AMERICAN LAW REGISTER.

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THE FORFEITURE OF CORPORATE FRANCHISES.

THE AMERICAN LAW REGISTER, for October 1865, contained the opinion of Judge GRIER, delivered in a case pending in the Circuit Court of the United States for the Western Circuit of Pennsylvania, in which the Mayor and City Council of Baltimore were complainants, and the Connellsville and Southern Pennsylvania Railroad Company were defendants.

The opinion in question was a very brief one, and we do not feel called upon to criticise it in detail. The case itself has since assumed a different form; and the general questions involved in the litigation will probably be settled by the Supreme Court.

In the meanwhile, however, it may not be uninteresting to review the general principles involved in that case.

The Pittsburgh and Connellsville Railroad Company was incorporated by an act of the legislature of Pennsylvania, approved on the 3d day of April 1837.

It was authorized to construct a railroad from Pittsburgh, by the course of the Monongahela and Youghiogheny rivers, to some suitable point at or near Connellsville. (Sec. 8.)

It was allowed a period of five years, from the date of the charter, within which it might commence this work. (Sec. 17.) But it was also provided that "if the said company shall not commence the construction of the said railroad within the term of five years from the passing of this act, or if, after the completion of the said railroad, the said corporation shall suffer the same

to go to decay and be impassable for the term of two years, this charter shall become null and void, except so far as compels said company to make reparation for damages." (Sec. 17.)

It was further provided, that "if the said company shall at any time misuse or abuse any of the privileges herein granted, the legislature may resume all and singular the rights and privileges hereby granted to the said corporation." (Sec. 20.)

By the 5th section of an act approved on the 18th of April 1843, it was declared that the charter of this company was "revived, extended, and continued in force, upon the same terms, conditions, and limitations as were contained in the original act."

Certain changes were made in the charter by this act; and by the 7th section, especially, a power was given to the company to extend the said railroad, beyond Connellsville, to any point on the waters of Youghiogheny, within the limits of the state of Pennsylvania.

It is immaterial whether this act be construed as giving a new period of five years for the commencement of this work, or as dispensing with the requirement to commence it within a specified time. It is certain that the act in question did not create a new corporation, but served "merely to continue the existence of an old one:" *Bellows* v. *Hallowell and Augusta Bank*, 2 Mason 44.

Nor can it be doubted that the legislature, by the passage of this act, waived all causes of forfeiture which had previously occurred. The reviving of the charter, and continuing it in force, from and after the passage of the act last referred to, is as full and perfect a legal waiver of prior forfeitures as could be framed.

The 9th section of the act, authorizing the laying out of a state road from the borough of Orwigsburg, approved April 10th 1846, is another recognition of the continued corporate existence of this company, under the sanction of the state of Pennsylvania.

The act authorizing the cities of Pittsburgh and Allegheny, and the boroughs of West Newton and Connellsville, to subscribe to the stock of this company, approved April 12th 1853, is another marked instance of legislative waiver of all antecedent forfeitures.

So also are the acts to incorporate the Safe Harbor and Susquehanna Turnpike Company and for other purposes, approved April 18th 1853, which, in its 5th and 6th sections, especially alludes to this company.

Indeed, the 5th section of the act last named, which authorizes

the Pittsburgh and Connellsville Railroad Company "*to mortgage or otherwise incumber their said road, and any real and personal estate, which may belong to it, for the purpose of carrying out the privileges granted by the act and the several supplements thereto incorporating the same*," is as express an instance of waiver of *preceding* causes of forfeiture, as can be imagined.

For it will be observed that the Legislature, in this 5th section, not only notices the powers of this corporation as existing unimpaired, but itself offers a bonus to counties, corporations, municipalities, and individuals, in order to induce new loans and subscriptions to the road, by providing that the bonds or certificates, issued by the company to such parties, should be free from taxation.

And by the 6th section the same company was authorized *to apply its whole corporate powers* to the extension of its road to any point in Somerset or Bedford counties, so as to form a connection with the Chambersburg and Allegheny Railroad, or any other railroad that might be constructed. The act relative to this company, approved on the 6th of April, 1854, is, by the 3d section, a re-declaration of the provisions of the 5th section of the Act of April 18th, 1853. The Act of March 21st, 1855, relating to this company, is another example of the recognition by the state that it remained in possession of its full corporate powers at the date of this act.

The Legislature of Pennsylvania, by authorizing the execution of mortgages and the issue of certificates of stock by this company to third parties, upon loans or payments of money to be made by them, must be understood as having thus declared that the corporate powers of the company in which these investments were made, remained unchanged and undiminished. The state of Pennsylvania, therefore, could not, afterwards, found a right upon its own wrong. It made, by the Acts of Assembly to which attention has been called, a declaration or representation of the continuing validity of the whole charter of this company. It authorized this company to borrow and act, as if it were entitled to a continuing existence, with intent that others should rely and act thereon. Upon its action others, the Mayor and City Council of Baltimore among the rest, have honestly relied and acted. The state of Pennsylvania could not afterwards be permitted to prove that its representations were false, or that its acts were

ineffectual, if any injury would occur to the innocent party or parties, who acted in full faith in their truth or validity. "*Qui tacet, consentire videtur; qui potest et debet vetare, jubet:*" *Wendell* v. *Van Renselaer*, 1 Johns. Ch. 344; Parsons on Contracts, 5th ed., vol. 3, 793, 794, 795, 796, 797, and 798; *Zabriskie* v. *Cleaveland, Columbus and Cinn. Railroad Co.*, 23 Howard 400; *Moran* v. *Commissioners of Miami County*, 2 Black, S. C. R. 731.

These acts, to which reference has been made, taken in connection with the admitted facts of the case, would seem to dispense with the necessity of referring even to the act supplemental to the acts incorporating "The Pittsburgh and Connellsville Railroad Company," which was passed on April 11th, 1856. Nevertheless, the act in question is directly confirmatory of the view heretofore taken.

By the 1st section of the act last named, it is provided "that any defect or irregularity in the proceedings of the commissioners appointed by the several Acts of Assembly incorporating the Pittsburgh and Connellsville Railroad Company, in taking subscriptions to and organizing said company, and any defect or irregularity in the proceedings of the board of directors of said company, in organizing *and conducting the affairs of the same*, so far as the said defect or irregularity may have proceeded from the neglect or omission of the said commissioners or board of directors, fully to comply with the requisitions of the said acts of incorporation and their supplements, be and the same are hereby remedied and supplied; and that the charter of incorporation of said company shall not be affected or invalidated in consequence of such omission or neglect by the said commissioners or board of directors to comply fully with its requirements."

It is difficult to conceive language more capable of waiving any acts of forfeiture, which this corporation may have committed. The act *remedies and supplies* all defects or irregularities in the proceedings of the commissioners in taking subscriptions and organizing the company;—all defects or irregularities in the proceedings of the board of directors of said company in organizing *and conducting the affairs of the same, so far as the said defect or irregularity may have proceeded from the neglect or omission of the said commissioners or board of directors fully to*

comply with the requisitions of the said acts of incorporation and their supplements.

This section therefore expressly and distinctly *remedies and supplies* every neglect or omission of the directors in failing to comply *fully* with the requirements of their charter or of its supplements. Not only does the section in question do this, but, as if to leave no room for question, it affirms its own curative power by declaring not only that any defect or irregularity, *in conducting the affairs of the corporation*, is remedied and supplied, but that the *charter* of incorporation shall not be invalidated in consequence of the omission or neglect of the directors to comply *fully* with its requirements.

The charter of the company is its act of incorporation and the supplements thereto, which have been accepted by the company.

Now the Legislature of Pennsylvania must be supposed to have known that, to work a forfeiture, there must be *wilful* abuse or *improper* neglect; something more than *accidental* negligence, excess of power, or mistake in the mode of exercising an acknowledged power: *Eastern Archipelago Co.* v. *Queen*, 2 E. & B. (75 E. C. L. R.) 869; *People* v. *Bristol and Rensselaerville R. R. Co.*, 23 Wend. 222; *Railroad Co.* v. *Canal Co.* 4 G. & J. 107; *Board of Commissioners Fred. Female Seminary* v. *The State*, 9 Gill 379.

The Legislature of Pennsylvania, therefore, did not seek to relieve the company, by the act last cited, from the legal consequences of *accidental acts of negligence*, or of *mistakes*. It did not seek, even, to perform the useless task of relieving it from the consequences of some one specific act of nonfeasance, not committed wilfully or voluntarily. For it knew that such matters caused no forfeiture.

It did expressly, however, relieve the company from the legal consequences of neglects *which were not accidental, and which were therefore wilful*, if any such had been committed.

It did expressly relieve the company from the consequences of neglects to perform plain corporate duties,—to provide for plain corporate obligations; for these, only, are the omissions and neglects which invalidate a charter. *Such neglects and omissions are misuses and abuses of corporate powers in the true sense of these terms.* All such omissions and neglects, misuses and abuses, are expressly waived by the terms and manifest meaning of the Act of April 11, 1856, sec. 1.

Voluntary neglects and omissions are, to speak accurately, the only modes in which a corporation can misuse or abuse any of the privileges which it lawfully possesses: *Sir Geo. Reynel's Case*, 9 Coke 99. For, if the corporation does what it has no right to do, it neither *misuses* or *abuses* its privileges, but commits simply an act of *usurpation*. For this reason it is that if a legally existing corporation abuse the powers confided to it, the proceeding against it at common law is properly by *scire facias;* but if it usurp a liberty, the proceeding is by *quo warranto: Willcock on Municipal Corp.*, 14 Law Library pp. 183, 184; *Regent's Un. of Md.* v. *Williams*, 9 G. & J. 427.

The offences are entirely distinct, although the same remedy by *quo warranto* exists by statute in Pennsylvania; Act June 14, 1836, sec. 2.

Nor can it be said that the Act of April 11th, 1856, sec. 1, condoned only matters of form, or such matters of defect, or irregularity, as did not amount to misuse or abuse. This is but to say that it condoned offences of accidental negligence, or mistake, which required no condonation. It did more. It condoned all omissions, or neglects, whereby it might appear that the board of directors had failed to comply, *fully*, with the requirements of the charter and its supplements. And, as it condoned all failures to comply *fully* with the requirements of the charter and its supplements, it placed the company on the 11th of April, 1856, precisely in the position which it would have occupied if it had been admitted to have performed, up to that day, all its corporate duties and obligations.

To hold any other construction, would be to maintain that the Legislature of Pennsylvania intended, by this act, to relieve the corporation from the legal consequences of all acts of *slight* negligence, but to continue its responsibility for all acts of *gross* negligence. Such a construction, in view of the broad language of the statute, would be absurd even if there were, in a case like the present, any demonstrable distinction between slight negligence and gross negligence where both are voluntary; a distinction difficult at all times to define or maintain: *Wilson* v. *Brett*, 11 M. & W. 113; *Steamboat "New World"* v. *King*, 16 Howard 475; Story on Bailments, sec. 11; *Storer* v. *Gowen*, 18 Maine 77; *Wylde* v. *Pickford*, 8 M. & W. 443, 461, 462;

Hinton v. *Dibbin*, 2 Q. B. 646, 551 (42 E. C. L. 854, 855), Lord DENMAN.

It is scarcely necessary to say that if any misuse or abuse of the corporate privileges of this company had occurred, the state had the power to waive the forfeiture. The state of Pennsylvania, under the charter of incorporation, stands simply in the relation of a contracting party to the Pittsburgh and Connellsville Railroad Company: *Fletcher* v. *Peck*, 6 Cranch S. C. R. 87; *Dartmouth College* v. *Woodward*, 4 Wheat. 518.

The state may waive a forfeiture of that charter, precisely as a landlord may waive a forfeiture of a lease, or a notice to quit. If a landlord does any act which can be considered an acknowledgment of a subsisting tenancy, with knowledge that a breach has been committed of a covenant or condition, the forfeiture is thereby waived: *Doe ex dem. Morecraft* v. *Meux*, 4 B. & C. 606; *Griffith* v. *Prichard*, 5 B. & A. 795 (27 E. C. L. R. 185, 186); *Tarrant* v. *Hellier*, 3 T. R. 171; *Goodright* v. *Davids*, Cowper 805. In this last case, Lord MANSFIELD said briefly,— "cases of forfeiture are not favored in law, and where the forfeiture is once waived, the court will not assist it."

Since the state may waive a broken condition of a compact made with it, as well as an individual (Angell & Ames on Corp., ed. 1861, s. 778), the following cases may be cited to demonstrate, both by their facts and the conclusions of the several courts thereon, that the Legislature of Pennsylvania has, by the action to which allusion has been made, waived every forfeiture alleged to have been committed by this company prior to the 11th day of April, 1856: *Enfield Bridge Co.* v. *Conn. River Co.*, 7 Conn. 45, which is a leading case on this question; *Commonwealth* v. *Union Insurance Co.*, 5 Mass. 232; *People* v. *Manhattan Co.*, 9 Wendell 351; *People* v. *Phœnix Bank*, 24 Wend. 433; *Mechanics' Banking Association* v. *Stevens*, 5 Duer 676; *Slee* v. *Bloom*, 5 Johns. Ch. Rep. 379. This last case was affirmed as to the law of misuser, though reversed in other particulars, in Court of Errors, 19 Johns. 456; *Bank of Niagara* v. *Johnson*, 8 Wend. 654; *John* v. *Farm. & Mechanics' Bank of Indiana*, 2 Blackford 369; *State* v. *Miss., Ouachita, and Red River Railroad Co.*, 20 Ark. 497; *Briggs* v. *Penniman*, 8 Cowen 396, in Court of Errors, per SPENCER; *People* v. *Hillsdale and Chatham Turnpike Road Co.*, 23 Wend. 257; *Atcha-*

falaya Bank v. *Dawson*, 13 Louisiana S. C. R. 509; *State* v. *Fourth N. H. Turnpike Co.*, 15 N. H. Rep. 167, GILCHRIST, J.; *Canal Co.* v. *Railroad Co.*, 4 G. & J. 127.

But even if any cause of forfeiture had taken place, and the legislation of the state of Pennsylvania, to which reference has been made, has not operated as a waiver of the forfeiture, *there was no constitutional authority for the passage of the penal act of* 1864.

When the charter of the Pittsburgh and Connelsville Railroad Company was passed in 1837, the Pennsylvania constitution of 1790 was in force. Under that constitution the *legislative* power of the Commonwealth (Art. 1, Sec. 1) was vested in the *General Assembly;* the *judicial* power of the Commonwealth was vested in certain named courts: Art. 5, sec. 1.

If the legislature of Pennsylvania intended, by the 20th section of the Act of April 3d 1837, to reserve to *itself* the right of determining, conclusively, the fact of the misuse or abuse of the privileges of the Pittsburgh and Connellsville Railroad Company, as the condition precedent of its right to resume the privileges granted to that corporation, *then it is very clear that it reserved to itself the performance of judicial functions, which, by the then existing constitution of the state, were confided exclusively to the judiciary.* It was constitutionally incapable of exercising the judicial powers thus reserved, because these powers had been granted exclusively to another body, *and the reservation of them to itself was therefore a nullity: Reg. Un. of Md.* v. *Williams*, 9 G. & J. 410.

The 26th section of the first article of the existing constitution of the state of Pennsylvania, which authorizes the annulment of charters thereafter conferred, when the legislature may deem them injurious to the Commonwealth, is subsequent in date to the charter of the Pittsburgh and Connellsville Railroad Company. The Pennsylvania Act of February 19th 1849 refers to charters thereafter passed. The Pennsylvania Act of May 3d 1855 (Purdon's Dig., 9th ed., tit. *Corporation*, sec. 53), is unconstitutional, so far as it refers to corporations previously incorporated, as was this company, in subordination only to the provisions of the constitution of 1790.

Art. 1, sec. 26, of the existing constitution in Pennsylvania operates simply as the engrafting of the right of alteration and

repeal on every charter granted subsequent to the adoption of that provision of the constitution. It is the reservation only of that discretionary power over charters, which legislatures often provide for as a part of the contract itself. It was competent for the legislature to have engrafted such a provision on the charter of the Pittsburgh and Connellsville Railroad Company, when it granted that instrument in 1837. But, as has been observed, it did a very different thing. It did not reserve a right to repeal the charter if it was, *in its opinion*, injurious to the citizens of the Commonwealth; but it reserved the right to repeal that charter if the company should misuse or abuse its privileges; *that is to say, not when the legislature might be of the opinion that it had misused its rights and privileges, but only when it was conclusively shown to all the world to have misused or abused its rights and privileges: Reg. Un. of Md.* v. *Williams*, 9 G. & J. 412.

The legislature of Pennsylvania, in undertaking so to construe the constitution of 1790 as to derive from it authority for the repealing act passed in 1864, has assumed *judicial* functions, which the Parliament of England even never undertakes, except in the passage of bills of attainder and of pains and penalties: Sedgwick on Cons. Law, ed. 1857, p. 146; 1 Bl. Com. 44; *Reg. Un. of Md.* v. *Williams*, 9 G. & J. 412. It has undertaken to be accuser and judge, to charge, convict, and condemn *uno flatu*.

In the discussion of the case of the *Erie and North Eastern Railroad Company* v. *Casey*, 26 Penna. State Rep. 301, 316, 319, and 321, it was strongly urged that, unless this power of determining conclusively the fact of misuse or abuse exist in the legislature, it was idle to have conferred upon it the power of forfeiting, in such event, the corporate rights and privileges of the offending body. It was urged that if legal proceedings were necessary, sufficient judgment might be pronounced as the result of a *scire facias;* and unless, therefore, it was intended by the contract that the state should have an additional remedy, why insert a provision authorizing the legislature to resume, in a given event, the privileges of the charter?

The general doctrines of this case are not, however, in strict harmony with the better-considered, at least, statement of the law in the case of *The Commonwealth* v. *The Delaware and Hudson Canal Company*, 43 Pa. St. Rep. 301.

But it is not for us to determine *why* the legislature of Penn-

sylvania used the language in question. It is enough to say that if it had not the constitutional power to reserve to itself the right of determining the judicial question of the misuse or abuse of a charter, *the consent of a chartered company could not give it that right.* The expression in the 20th section that the legislature may resume the rights and privileges granted, in case of their misuse or abuse, must be taken to mean simply that, when such facts of misuse or abuse are found to exist, by a proper proceeding, before a proper court, that then, upon a proper judgment, the rights and privileges of the corporation shall be adjudged, to the extent of the decreed forfeiture, to be invested in the state.

If the views presented hitherto are correct, the Act of 1864, declaring the forfeiture of certain rights of this company, cannot be sustained by any finding of a jury impannelled, subsequent to its passage, to try the question of misuse or abuse. The finding of the fact of misuse or abuse by a jury, *must precede any valid legislation revoking the charter of this company.* Such a finding, even though it be that an act of forfeiture had taken place prior to the passage of the Act of 1864, cannot sustain that act, *because the legislature had not the power to pass such an act, until the facts of abuse or misuse had been previously found by a jury, in a proper proceeding, instituted for that purpose, and conclusive in its character.*

A bill of attainder, in this country, would not be otherwise than a nullity, even if the facts which it assumed were afterwards duly proved in a court of competent jurisdiction, and before a jury duly impannelled. In fact and in law, however, the 20th section of the Act of April 3d 1837, incorporating the Pittsburgh and Connellsville Railroad Company, did not release the state of Pennsylvania, even if this company had committed any act of forfeiture, from the necessity of pursuing the ordinary course to enforce the proper penalty.

The causes of forfeiture could not be taken advantage of or enforced against the corporation in any other mode than by a direct proceeding for that purpose against it in the name and by the authority of the state; and this proceeding ought to have been a judicial one, under the Penn. Act of June 14th 1836, secs. 3–15. See Bacon's Abr., c. 3, tit. *Scire Facias;* Angell & Ames on Corp., ed. 1861, s. 777; *People* v. *Hillsdale Turnpike Company*, 23 Wend. 257; *Terret* v. *Taylor*, 9

Cranch 43; *Lehigh Bridge Company* v. *Lehigh Coal and Navigation Company*, 4 Rawle 24; *King* v. *Amory*, 2 T. R. 515, s. c., in House of Lords, 4 T. R. 422; *Rex* v. *Pasmore*, 3 T. R. 199; *Fewling* v. *Francis*, 3 T. R. 189; *City of London* v. *Vanacre*, HOLT, J., 12 Mod. 271; *Eastern Archipelago Company* v. *Queen*, 2 E. & B. (75 E. C. L. R.) 869; *Hamilton* v. *Annapolis and Elk Ridge Railroad Company*, 1 Md. Ch. Cas. 110, affirmed, 1 Md. 553; *Planters' Bank* v. *Bank of Alexandria*, 10 G. & J. 356; *Canal Company* v. *Railroad Company*, 4 G. & J. 107, 121, 122, 127; *Regents of University of Maryland* v. *Williams*, 9 G. & J. 420, 426.

It has been already shown that the power which the legislature has assumed to exercise in this case cannot be taken to be a cumulative remedy, because the legislature of Pennsylvania had not the constitutional power either to reserve or to apply the so-called cumulative remedy; and it could not so phrase this charter as to prevent the necessity of a resort to a *scire facias* or *quo warranto*: *Eastern Archipelago* v. *Queen*, 2 E. & B. (75 E. C. L. R.) 911, JERVIS, C. J.

In conclusion, it must be recollected that this is no case of *statutory forfeiture*, under the terms of the charter. The 20th section of the Act of April 3d 1837, does not even assert that the charter is to become null and void on the happening of the events therein named. Therefore, if the stringent doctrine of the case of *The United States* v. *Grundy & Thornburgh*, 3 Cranch 337 (1 Cond. S. C. R. 557), were applicable to the case of a charter at all, the rule adopted in that case would show that this was no case of statutory forfeiture.

No forfeiture was given by the 20th section of this charter. A forfeiture was not declared to be the legal penalty even of the misuse or abuse of the charter. *Misuse or abuse were not even said to make* the charter null and void. The pretence even of a *statutory* forfeiture cannot be derived from the terms or effect of the 20th section of the charter. That section operates simply as a declaration of the common law that such misuse and abuse will work a forfeiture; and leaves this case subject to the doctrine of MARSHALL, C. J., in the case last cited. "In all forfeitures, accruing at common law, nothing vests in the government until some legal step shall be taken for the assertion of its right; after which, for many purposes, the doctrine of relation carries back

the will to the commission of the offence." Therefore, the penal act in question, "relative to the Pittsburgh and Connellsville Railroad Company," Penn. Acts 1863, No. 914, was a usurpation of power properly belonging to the judiciary, and was unconstitutional and inoperative. Its recitals of alleged facts of misuse and abuse concluded nobody, and were wholly ineffectual. If this be true, so much of the 1st section of that act as undertook to provide for the appraisement and valuation of the expenditures of this company upon its lines of railroad southwardly and eastwardly of Connellsville was without any effect whatever; and the provision in the same section, vesting in the purchaser of such appraised work the right to use it, was equally nugatory.

It follows that the Act of 1864, No. 914, incorporating the Connellsville and Southern Pennsylvania Railroad Company, is wholly inoperative, in so far as it grants to that company any of the existing rights and franchises of the Pittsburgh and Connellsville Railroad Company.

The Pittsburgh and Connellsville Railroad Company had, at the time of the passage of that act, a vested right to choose a route for its road; and the state of Pennsylvania could not take this away by any legislative act, unless the charter of the company had been, in whole or in part, forfeited by a proper judicial proceeding: *Canal Company* v. *Railroad Company*, 4 G. & J. 144, 145, 150; *Regents of University of Maryland* v. *Williams*, 9 G. & J. 409, 410, 412.

RECENT AMERICAN DECISIONS.

Superior Court of Chicago.

GEORGE SHERWOOD ET AL. *v.* ALFRED H. ANDREWS ET AL.

A trade-mark, which is merely descriptive of the kind of articles or goods to which it is applied, is not a trade-mark in a legal sense, and is not entitled to protection as such.

A trade-mark, to entitle an assignee to protection in its exclusive use, must indicate by appropriate words, as "executor," "assignee," or "successor," his relation to the original proprietor.

The trade-mark of a defunct corporation does not descend to the stockholders at the time of its dissolution.